No. 90-871

In The

Supreme Court of the United States

October Term, 1990

STATE OF CONNECTICUT AND
GOVERNOR WILLIAM A. O'NEILL,

Petitioners,

v.

MASHANTUCKET PEQUOT TRIBE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE STATES OF ARIZONA, IOWA, LOUISIANA, MISSISSIPPI, NEBRASKA, NORTH DAKOTA AND WYOMING AS AMICI CURIAE IN SUPPORT OF THE STATE OF CONNECTICUT

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INTEREST OF THE AMICI CURIAE

The interest of the Amici Curiae States in support of the grant of the petition for certiorari herein lies in their mutual desire to have the provisions of the Indian Gaming Regulatory Act of 1988 ("IGRA"), Pub. L. 100-497, 25 U.S.C. §§ 2701-2721 and 18 U.S.C. §§ 1166-1168, clearly defined. In view of the mandate in the law compelling the various States of the Union to negotiate with requesting Indian Tribes over the scope and reach of certain gambling activities within Indian country, the issues presented by the petition for certiorari are important not only to the State of Connecticut, but to each of the Amici Curiae States.

Moreover, as it appears that this case is the first one to reach this Court following the enactment in 1988 of IGRA, it presents issues of first impression, the resolution of which will provide useful guidance to all States of the Union, as well as to affected Indian tribes, and not merely to the Amici Curiae States herein.

Accordingly, the Amici Curiae States support the State of Connecticut in its petition for a writ of certiorari and urge that the same be granted by this Court.

ARGUMENT

THE PETITION FOR CERTIORARI RAISES SIGNIFICANT AND IMPORTANT NATIONAL ISSUES OF LAW REGARDING THE PROPER INTERPRETATION OF IGRA

The Indian Gaming Regulatory Act of 1988 ("IGRA"), Pub. L. 100-497, 25 U.S.C. §§ 2701-2721 and 18 U.S.C.

§§ 1166-1168, seeks to establish a nationwide framework for the authorization, regulation and control of gambling in Indian country – and, under certain circumstances, in "noncontiguous" areas – within the various States of the Union. Indeed, the Senate Report accompanying IGRA[1] stated that, as of the date of the report (August 3, 1988), there were only five states – Arkansas, Hawaii, Indiana, Mississippi and Utah – " . . . that criminally prohibit any type of gaming, including bingo." *See* Sen. Rep. 100-446 at 11; 1988 U.S. Code Cong. & Admin. News 3071, 3081. Thus, it is clear that the issues presented by the petition for certiorari have nationwide application and impact and are not confined merely to the State of Connecticut.

The central significance of the issues presented in the petition for certiorari lies in the resolution of the question whether under IGRA, a State which allows strictly limited, charitable non-commercial gaming activities may properly be compelled to negotiate with a requesting Indian tribe for commercial tribal gambling operations which utilize the format of such state charitable games, but without the state restrictions. Stated otherwise, did Congress intend through the enactment of IGRA to lay the foundation for commercial casino gambling in States which permit charitable "Las Vegas Nights" or "Monte Carlo Nights", but otherwise criminally prohibit casino gambling operations such as those found in Nevada and New Jersey? It is the position of the Amici Curiae States that not only is that a result which Congress never

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[1] *See* Sen. Rep. No. 100-446; 1988 U.S. Code Cong. & Admin. News 3071.

intended, it is one which Congress specifically sought to avoid.

In its petition for certiorari, Connecticut sets forth a list of seven pieces of litigation pending in six different states from across the Union.[2] Each of the cases involves one or more of the issues addressed in the petition and/or the opinion of the Court of Appeals herein. The petition also properly notes that the present case will not be the last, since IGRA has not heretofore been reviewed by this Court.

It is for this reason alone, therefore, that the petition should be granted, for it involves important questions of federal law which have not been, but should be, settled by this Court within the purview of Rule 10.1(c), Rules of the United States Supreme Court.

From an intellectual perspective, it is difficult to reconcile the lower court's opinion with the legitimate right of the States to expect that, through the balanced operation of IGRA, the " . . . interests of *both* sovereign [State and Tribal] entities are met with respect to the regulation of complex gaming enterprises. . . . " (emphasis added).[3] If a State, through its freely-elected representatives and officials, determines that a particular type or scope of gaming activity is to be lawfully allowed, but that

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[2] *See* Connecticut Petition for Certiorari, pp. 14-15, n. 4. The suits involve the States of California, Michigan, Minnesota, Mississippi, New York and Wisconsin.

[3] *See* Sen. Rep. No. 100-446 at 13; 1988 U.S. Code Cong. & Admin. News 3071, 3083.

another type or scope of gaming activity is to be criminally prohibited as unlawful, such determinations should be accorded due deference.

In this respect, however, the lower court's opinion falls short, despite the admonition of Senate Report 100-446 that IGRA contemplates recognition of the State's legitimate law enforcement and public policy concerns. It is of substantially more than passing concern to the States that, under the purported authority of the IGRA "compacts" and the "civil/regulatory-criminal/prohibitory" dichotomy,[4] they may be divested of the power to determine what are and what are not their legitimate public policy concerns regarding gambling operations which will affect and impact their residents.

In this regard, moreover, it would be naive to suggest that the State of Connecticut, following the ruling of the District Court herein, could have successfully negotiated a compact which, for example, limited the tribal gambling operation in question to a purely non-commercial enterprise. It would be equally naive to suggest, as a further example, that Connecticut could have successfully negotiated a compact which forbade the payment of cash to casino game winners. Gamblers, and in particular non-Indian, non-tribal member individuals, do not patronize casinos with the objective of winning merchandise prizes.

And yet, without regard to the subsequent submission of "last best offer" compacts to the mediator herein

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[4] The dichotomy was first fashioned in *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982). *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 210-211 (1987).

pursuant to 25 U.S.C. § 2710(d)(7)(B)(iv), the District Court opinion specifically held, and the Court of Appeals affirmed, that, under this Court's pre-IGRA decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), the "civil-regulatory/criminal-prohibitory" dichotomy mandated a conclusion that the low-stakes, charitable games legalized by Connecticut constituted "such gaming" as proposed by the tribe under 25 U.S.C. § 2710(d)(1)(B).

Under this rationale, if a State permits a charitable, non-commercial organization such as a church to conduct a strictly regulated "Casino Night", with scrip wagers and merchandise only prizes, the District Court and Court of Appeals opinions mandate that State to negotiate with a requesting tribe for a commercial casino. To force a State, for example, to consider repealing all of its laws permitting charities to conduct such activities as the only alternative to preventing the incursion of commercial casinos would be an unfortunate and unnecessary consequence of the lower court opinion.

Such a result is not one intended by Congress, whether one examines the specific language of IGRA, Senate Report 100-446, the extensive floor debates[5] or the

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[5] *See, e.g.*, 134 Cong. Rec. S12643-S12663 (daily ed. Sept. 15, 1988); 134 Cong. Rec. H8146-H8157 (daily ed. Sept. 26, 1988).

transcripts of the congressional hearings.[6] With regard to the "such gaming" verbiage in 25 U.S.C. § 2710(d)(1)(B), the Court of Appeals opinion herein erroneously interprets the ruling in *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358 (8th Cir. 1990) in concluding that Connecticut "Las Vegas Nights" were intended by Congress to have the effect of compelling the States to negotiate with requesting Indian tribes for commercial casino operations.

As heretofore stated, the position of the Amici Curiae States is that such was not the intent of Congress in enacting IGRA. However, if, in fact, such a result was an objective of Congress, this Court should make that clear.

CONCLUSION

Accordingly, for the foregoing reasons, the Amici Curiae States respectfully submit that the Petition for Certiorari should be granted, that briefing on the merits should be ordered and that the matter should be thereafter set for argument to the Court.

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[6] *See, e.g.*, "Gaming Activities on Indian Reservations and Lands: Hearing Before the Select Committee on Indian Affairs on S. 555 and S. 1303," June 17, 1987, 100th Cong., 1st Sess. (S. Hrg. 100-341) at 92-93 (colloquy between Sen. Daniel Inouye and a representative of the U.S. Department of Justice on "casino nights" as not contemplating "casinos" under S.555, which ultimately became IGRA).

Respectfully submitted this 21st day of December, 1990.

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